Public Prosecutor v Mohd Ali bin Abang & Ors

HIGH COURT (KUCHING) — CRIMINAL APPEAL NO KG19 OF 1990
CHONG SIEW FAI J
1 MARCH 1994

Criminal Procedure *— Appeal — Against acquittal — Charge of rape — Burden on prosecution to show order of discharge and acquittal wrong*

Criminal Procedure *— Trial — Cautioned statement — Proof beyond a reasonable doubt that cautioned statement voluntary — Criminal Procedure Code (FMS Cap 6) s 113(1)(a)(i) — Evidence Act 1950 s 24*

Criminal Procedure *— Trial — Charge of rape — Burden on prosecution to prove that intercourse had taken place — Medical report silent as to whether intercourse had taken place — Whether report was of help to prosecution as it did not say that there was no sexual intercourse*

Criminal Procedure *— Appeal — Against acquittal — Charge of rape — Credibility of witness successfully impeached — Whether whole evidence of witness to be disregarded*

Criminal Procedure *— Trial — Charge of rape — Whether sessions court judge could amend charge to one of attempted rape or abetment of rape — Criminal Procedure Code (FMS Cap 6) s 158 — Penal Code (FMS Cap 45) ss 354 & 511*

The first and second respondents were charged with raping the complainant but the sessions court judge discharged and acquitted them at the close of the prosecution case without their defence being called. The prosecution has appealed against that decision.

Held, dismissing the appeal:

(1) On appeal, the burden is on the prosecution to show that the order of discharge and acquittal was wrong. It is for the prosecution to show conclusively that the inference of guilt was irresistible and only where, on the proven facts and circumstances of the case, the decision could not have been legally reached, that an interference in appeal against acquittal was justified.

(2) The burden of proving the voluntariness of a cautioned statement or a confession, in the sense that its making had not been caused by any inducement, threat or promise as stated in s 113(1)(a)(i) of the Criminal Procedure Code (FMS Cap 6) ('the Code') and s 24 of the Evidence Act 1950, lies on the prosecution and the standard of proof required is that of proof beyond a reasonable doubt.

(3) The burden lies on the prosecution to establish that sexual intercourse had taken place. If the medical report was silent as to whether any sexual intercourse had taken place within reasonable time of the charge, the report would be of no or hardly any assistance to the prosecution.

(4) While there is a duty on a magistrate or sessions court judge to consider whether the evidence in a case shows that an accused had committed some offence other than that with which he is charged, the main obligation is on the prosecution to draw to the attention of the magistrate or sessions court judge the possibility of convicting on a different offence. Here, it was argued that as regards the second respondent, the sessions court judge should have considered the application of s 158 of the Code and amend the charge to one of attempting to commit rape or abetment of rape. But s 158 was not relied on against the second respondent, nor did the prosecution refer to any specific part of the evidence to indicate that the sessions court judge should have considered ss 511 or 354 of the Penal Code (FMS Cap 45). The court was not persuaded that the sessions court judge had been wrong in not considering the exercise of the court's power under s 158. Nor was the court persuaded that it was justified to alter the charge by invoking ss 511 or 354 of the Penal Code (FMS Cap 45) against the second respondent.

(5) When the credibility of a witness is impeached, it does not mean that all the evidence of the witness must be disregarded. It is still incumbent upon the court to carefully scrutinize the whole of the evidence to determine which parts of her evidence are the truth and which should be disregarded.

[Bahasa Malaysia summary

Responden pertama dan kedua telah dituduh kerana merogol pengadu itu tetapi hakim mahkamah sesyen telah melepaskan dan membebaskan mereka pada penghujung kes pihak pendakwa tanpa pembelaan mereka dipanggil. Pihak pendakwa telah membuat rayuan terhadap keputusan itu.

Diputuskan, menolak rayuan itu:

(1) Pada rayuan, beban terletak pada pihak pendakwa untuk menunjukkan bahawa perintah pelepasan dan pembebesan itu adalah salah. Adalah menjadi tugas pihak pendakwa untuk menunjukkan secara konklusif bahawa inferens bersalah itu adalah nyata dan hanya di mana, atas fakta dan keadaan yang terbukti kes itu, keputusan itu tidak dapat dicapai berdasarkan undang-undang, suatu campur tangan pada rayuan terhadap suatu pelepasan boleh dijustifikasikan.

(2) Beban membukti bahawa suatu pernyataan beramaran atau suatu pengakuan salah telah dibuat secara sukarela, iaitu ia tidak dibuat akibat suatu dorongan, ugutan atau janji, sebagaimana yang telah dinyatakan di dalam s 113(1)(a)(i) Kanun Acara Jenayah (FMS Bab 6) ('Kanun itu') dan s 24 Akta Keterangan 1950, terletak pada pihak pendakwa dan tahap membukti yang diperlukan adalah melebihi keraguan yang munasabah.

(3) Beban membukti terletak pada pihak pendakwa untuk menunjukkan bahawa perhubungan seks telah berlaku. Jika laporan perubatan tidak menyatakan sama ada hubungan seks telah berlaku dalam jangkamasa yang munasabah dari masa dakwaan itu dibuat, laporan itu tidak akan membantu pihak pendakwa.

(4) Manakala merupakan tugas majistret atau hakim mahkamah sesyen untuk mempertimbangkan sama ada keterangan di dalam suatu kes menunjukkan bahawa tertuduh telah melakukan kesalahan selain daripada yang beliau telah dituduh, obligasi utama terletak pada pihak pendakwa untuk menarik perhatian majistret atau hakim mahkamah sesyen kepada kemungkinan menghukum tertuduh atas kesalahan yang berlainan. Di sini, telah dihujahkan bahawa bagi responden kedua, hakim mahkamah sesyen sepatutnya mempertimbangkan pemakaian s 158 Kanun itu dan meminda tuduhan itu supaya menjadi suatu tuduhan cuba merogol atau bersubahat untuk merogol. Tetapi s 158 tidak digunakan terhadap responden kedua, dan pihak pendakwa juga tidak merujuk kepada sebarang bahagian spesifik keterangan itu untuk menunjukkan bahawa hakim mahkamah sesyen sepatutnya mempertimbangkan ss 511 atau 354 Kanun Keseksaan (FMS Bab 45). Mahkamah tidak yakin bahawa hakim mahkamah sesyen telah membuat kesilapan apabila beliau gagal mempertimbangkan penggunaan kuasa mahkamah di bawah s 158. Mahkamah juga tidak yakin bahawa ia mempunyai justifikasi untuk menukar tuduhan itu dengan menggunakan ss 511 atau 354 Kanun Keseksaan (FMS Bab 45) terhadap defendan kedua.

(5) Apabila kebolehpercayaan seseorang saksi dicabar, ini tidak bermakna bahawa kesemua keterangan saksi itu mesti tidak diendahkan. Mahkamah masih berkewajipan untuk meneliti secara berhati-hati keseluruhan keterangan untuk menentukan bahagian mana keterangan itu adalah benar dan bahagian mana yang patut tidak diendahkan.]

Notes

For cases on cautioned statements, see 5 *Mallal's Digest* (4th Ed) paras 2553–2570 and [1991] Mallal's Digest 942–943.

For cases on appeals against acquittals, see 5 *Mallal's Digest* (4th Ed) paras 89–97.

Cases referred to

1 *Chiu Nang Hong v PP* [1965] 1 MLJ 40 (refd)
2 *Gan Leong Gee & Anor v PP* [1969] 2 MLJ 76 (refd)
3 *James v R* (1970) 55 Cr App R 299 (refd)
4 *Dato Mokhtar bin Hashim & Anor v PP* [1983] 2 MLJ 232 (refd)
5 *Haw Tua Tau v PP* [1981] 2 MLJ 49 (not folld)
6 *Khoo Hi Chiang v PP and another appeal* [1994] 1 MLJ 265 (folld)
7 *PP v Somwang Phatthanasaeng* [1992] 1 SLR 138 (folld)
8 *Sivalingam v PP* [1982] 2 MLJ 172 (refd)

A 9 *PP v Heng You Nang* [1949] MLJ 285 (refd)
10 *R v Cheah Teow Peng* [1952] MLJ 216 (refd)
11 *PP v Oh Keng Seng* [1979] 2 MLJ 174 (refd)
12 *PP v James Tan* [1983] 2 MLJ 173 (refd)

B *Thomas Akin* (Deputy Public Prosecutor) for the appellant.
First respondent in person.
Anthony Tai (*Anthony Tai Advocates*) for the second respondent.

Cur Adv Vult

C **Chong Siew Fai J**: This is an appeal by the prosecution against the decision of the Sessions Court at Kuching discharging and acquitting the first respondent, Mohd Ali bin Abang, and the second respondent, Razali bin Raminggan also known as Tambi, of the charge of rape at the close of the prosecution case without their defence being called.

D Originally, this appeal was also against two others who were charged together with the above two respondents and who were likewise discharged and acquitted. As the prosecution chose not to proceed against them, the appeal against them was struck out. Accordingly, I am now concerned only with the appeal against the first and the second respondents.

E The two respondents were charged with the offence of raping the complainant (PW7) in an unoccupied house at Kampung Lintang, Petra Jaya, Kuching on or about 13 July 1986 at about '12am' (In fact, on the evidence, the time of the incident as alleged was around the midnight of 12 July 1986 or shortly thereafter).

F The evidence of the complainant (PW7) is briefly this: on the night of 12 July 1986, she and her friend, Norliza bte Majalis (PW11), went to the cinema. On their way home after the show, they were stopped by a group of young men (more than ten). Meanwhile the first respondent, Ali, whom the complainant had never met before, arrived. The first respondent took her to a house where he raped her. After that he, at her request, took her and met Norliza. They also met the first respondent's friends — some six

G to ten in number. They took her to another house. On the way, a man joined them and pulled her into the house where they raped her. The complainant said it was very dark and she could not recognize any one of them. As to whether the first respondent was present on this second occasion, the complainant's evidence was rather unsatisfactory. At first she said she was not sure but immediately thereafter she said it appeared to her

H that he was present and also raped her. She further said that she could not remember who else raped her.

After the second incident, a thin man intended to take her to his house. On the way, she met Norliza (PW11) and the thin man ran away.

I PW5, Penghulu Haji Sarbini said at about 4am on 13 July 1986, PW11, Norliza, went to his house and told him that her friend was taken away by a group of people and might have been raped. He said that at about 4.30am, the complainant arrived and said she had been raped by the first respondent whom she could recognize and that other persons had also

'disturbed' her. As to the number of persons disturbing her, the evidence of the Penghulu was not clear. In the examination-in-chief, he said the complainant mentioned four persons but under cross-examination, his evidence was that the complainant mentioned ten persons.

The complainant was brought to the police station where she lodged a report with the police at about 8am the same morning.

The complainant was medically examined by PW13, Dr Hajjah S Jehan, on the afternoon of 13 July. An identification parade was held. I shall revert to these two matters at a later stage.

In her evidence, PW11, Norliza, said that after going to the cinema on the night of 13 July 1986 with the complainant, they met some boys amongst whom was the first respondent. PW11 said the first respondent approached the complainant for sex to which the complainant agreed. The first respondent asked about the price and the complainant answered RM5. According to Norliza, the two then left, and she herself also left with another person on a motor-cycle. Later, she went to the community hall and waited for the complainant. Norliza said that at the community hall, a group of boys approached her. One of them attempted to disturb her. She ran to the Penghulu's house and woke him up. Five minutes later, the complainant also arrived.

Norliza's evidence was inconsistent with her statement to the police (exh P20) in material particulars. Her credit was successfully impeached.

I would also point out that the date of 13 July 1986 (night), stated by Norliza is inconsistent with the evidence of other prosecution witnesses: eg the complainant said it was on 12 July 1986; Penghulu Haji Sarbini (PW5) who said Norliza went to his house on 13 July 1986 at about 4am; police constable Roslan (PW2) who received the complainant's report on 13 July 1986 at about 7.50am.

The prosecutor also sought to admit in evidence the cautioned statements of the first and the second respondents. As the admissibility was challenged by the defence, a 'trial within the trial' was held at the end of which the learned sessions court judge ruled the statements inadmissible (see p 67 of the appeal record).

On appeal, the burden is on the prosecution to show that the order of discharge and acquittal was wrong. It is for the prosecution to show conclusively that the inference of guilt is irresistible. It is only where, on the proved facts and circumstances of the case, the decision could not have been legally reached that an interference in appeal against acquittal is justified.

It is well established in law that in cases of rape, corroboration of the evidence of the complainant is, as a matter of prudence, necessary, ie corroborative evidence confirming in some material particular that intercourse as alleged had taken place, that it had taken place without the complainant's consent and that the defendants were the men who committed the crime. See, eg *Chiu Nang Hong v PP*;[1] *Gan Leong Gee & Anor v PP*;[2] and *James v R.*[3]

Various grounds were raised in the petition of appeal. At the commencement of the hearing, the prosecution abandoned ground 4(i). There remain grounds 2(i), (ii), (iii), 3 and 4. Ground 2(ii) and (iii),

A however, were not specifically dealt with in the submission of the learned deputy public prosecutor.

I find it convenient to deal with the grounds in the following order:

Ground 4 of the appeal

B Ground 4 reads: 'The learned trial judge of the sessions court erred in law and in fact in ruling that the first and second accused/respondents' cautioned statements were not made voluntarily.' In holding the statements of the first and the second respondents inadmissible in evidence, the learned sessions court judge said that she was not satisfied beyond reasonable doubt that the C statements were made voluntarily, adding that there was scattered evidence of certain forms of inducement (see her ruling on p 67 of the appeal record). The learned sessions court judge indicated that reasons would be given when asked for. However there is no indication of any such request, and, accordingly, no reason was given. Thus it befalls upon me to review the relevant evidence.

D I find it convenient to deal with the admissibility of the cautioned statements of the first and the second respondents separately. Before doing so, however, I would briefly state, as a general principle of law, that the burden of proving the voluntariness of a cautioned statement or a confession, in the sense that its making has not been caused by any inducement threat E or promise, as stated in proviso (a)(i) of s 113(1) of the Criminal Procedure Code (FMS Cap 6) ('the Code') and s 24 of the Evidence Act 1950, lies on the prosecution and the standard of proof required is that of proof beyond reasonable doubt. See *Dato Mokhtar bin Hashim v PP*[4] at p 272.

The first respondent's cautioned statement

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As regards the first respondent's cautioned statement, the learned trial sessions court judge, in my view, was right in excluding it.

In the 'trial within the trial' PW2, ASP Joseph Jan, said that on 15 July 1986 at about 4.20pm, he was informed that the first respondent's statement G was not recorded yet; and he instructed Insp Abang Junaidi to record his cautioned statement. PW2 further said a cautioned statement had to be taken no matter a suspect had anything to say. Under cross-examination, PW2 said when Insp Norzanah told him the cautioned statement had not been recorded, he immediately arranged for an available officer. He further said the first respondent must be prepared on 15 July 1986 at 4.20pm, to H give his cautioned statement and he gave instructions for the cautioned statement to be taken. He said he did not know whether 'it' was to threaten him or not. On re-examination, he said on 15 July 1986, he told Insp Norzanah that the cautioned statement of the first respondent must be recorded whether or not he wished to say anything. PW2, ASP Joseph Jan, I appears to me to have a wrong conception about the giving of a cautioned statement under s 113 of the Code. He gave the impression that a suspect must give a cautioned statement whether he likes it or not. This runs counter to the fundamental principle that a cautioned statement or confession must be voluntary.

There is evidence from the first respondent that he was asked and threatened by Insp Razak (PW10) and his three other friends to confess; the inspector threatened to put him in the Batu Kawa cell, and was told by Joseph Jan (PW14) to admit and he would be released. Despite the denials by PW10 and PW14, voluntariness in making a statement is an issue of fact. There is evidence upon which the learned sessions court judge could properly come to the conclusion of inadmissibility.

Contradiction of prosecution evidence in the following aspects weakens the prosecution case, bearing in mind that the burden rests on the prosecution to establish beyond all reasonable doubt the voluntariness of the cautioned statement of the respondent.

PW16, Abang Junaidi, said that ASP Joseph Jan personally brought the first respondent to his (PW16's) room and took him away and that he handed to Joseph Jan a copy of the cautioned statement (at p 49). This was denied by ASP Joseph Jan (at pp 56–58).

If the superior officer, Joseph Jan, had so instructed, it is difficult to imagine Abang Junaidi acting against the instructions. In any event, there is no evidence that he would do so. It is unsafe to admit the first respondent's cautioned statement. The learned trial sessions court judge was justified in rejecting it.

The second respondent's cautioned statement

As regards the statement of the second respondent, the striking feature, in my view, is the lack of any explanation as to why and how he came to give the statement sought to be admitted when almost immediately before that he had given a statement to PW10, Insp Abdul Razak. It might be said that the evidence favouring the exclusion of the second respondent's cautioned statement, is not as strong and weighty as that relating to the first respondent, nevertheless, I am not convinced that the learned trial sessions court judge was unjustified in rejecting the cautioned statement. In any event, on the learned deputy public prosecutor's own submission, the appeal of the prosecution was not so much against the acquittal and discharge of the second respondent on the charge of rape but rather that the learned trial sessions judge should have resorted to s 157 of the Code. I shall deal with this under Ground 3 of the appeal.

Ground 2(ii) and (iii) of the appeal

(ii) In ruling that the prosecution has not made out a case against the first, second, third and fourth respondents, the learned trial judge erred in law and in fact in finding that 'the complainant's story is not supported by the medical evidence' whereas the medical report (exh P21) did not state that there was no sexual intercourse.

(iii) The learned judge of the sessions court's decision in acquitting and discharging the respondents at the close of the prosecution's case is most unsatisfactory and cannot be supported having regard to the weight of evidence adduced.

As stated earlier, the learned deputy public prosecutor did not specifically deal with these grounds.

A Before dealing with these grounds, it is necessary to point out that on the issue of whetherthe defence is to be called, the test laid down in *Haw Tua Tau v PP*[5] which was followed or applied in numerous cases in our Malaysian courts (ie that the trial court was to decide as a matter of law whether there was some evidence (not inherently incredible) which if
B accepted as accurate, would establish each essential element in the offence alleged) was not adopted in the Supreme Court decision in *Khoo Hi Chiang v PP and another appeal.*[6] In that case, the Supreme Court, after reviewing a number of authorities decided before *Haw Tua Tau v PP*,[5] held that the test is one of proof against the accused beyond all reasonable doubt. I would reproduce below the relevant passages from the judgment of Edgar
C Joseph Jr SCJ [at p 290]:

> It follows, therefore, that in this country, at the close of the prosecution's case, the question for decision by the trial judge, (except when he is sitting with a jury) is not just a hypothetical question of law but an actual and quite different question of fact illustrated by the numerous Malayan and Singapore cases
D decided before our courts were infected by the *Haw Tua Tau* virus.
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> Consequently, the duty of the court, at the close of the case for the prosecution, is to undertake, not a minimal evaluation of the evidence tendered by the prosecution in order to determine whether or not the prosecution evidence is inherently incredible — the *Haw Tua Tau* test — but a maximum evaluation of such evidence, to determine whether or not the prosecution has established the
E charge against the accused beyond all reasonable doubt.

Now, in our instant case, PW13, Dr Hajjah Jehan, who examined the complainant on 13 July 1986 at about 2pm, said that the complainant's vagina had old tears which meant she had had sexual intercourse many times. The doctor found no evidence of fresh bruise or abrasion on the
F complainant's private part, which was not inflamed. According to the doctor, the state of the complainant's vagina was not consistent with her having sexual intercourse with five or six men. It was not likely though possible (at p 40 of the appeal record).

Now, the remark of the learned sessions court judge that 'the complainant's story is not supported by the medical evidence' must be read
G with the above evidence in mind and in the light of the following:

(1) that the charge in the lower court was against the four accused who were alleged to have raped the complainant; and
(2) that the complainant's evidence is that she was raped by a number of persons. See for example:
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   (i) 'There were a lot of them ... They forced me to lay down and have sex with them.' (At p 12 of appeal record.)
   (ii) 'They raped me outside the house.' (At p 16 of appeal record.)
   (iii) 'I do not know how many times I was raped as there were so many of them.' (At p 23 of appeal record.)

I Thus considered and read, the learned sessions court judge was entirely justified in making the remark as she did. Ground 2(ii) has no merit. Under this ground, the prosecution contended that the medical report (exh P2) did not state that there was no sexual intercourse. All that need be said is

that the burden lies on the prosecution to establish that sexual intercourse had taken place. If the medical report is silent as to whether any sexual intercourse had taken place within reasonable time of the charge, the report would be of no or hardly any assistance to the prosecution. A

According to the complainant, while the first respondent had intercourse with her, she fought back, tried to resist and struggle, and wanted to escape. Her version of being raped does not find consistency with the evidence of PW13, Dr Hajjah Jehan, who examined her on the same day and failed to find any fresh bruise or abrasion or even redness on the complainant's private part and there was no explanation for its absence. B

The credibility of PW11, Norliza, was impeached. As a matter of law, in such a circumstance, it does not mean that all the evidence of the witness must be disregarded. It is still incumbent upon the court to carefully scrutinize the whole of the evidence to determine which parts of her evidence are the truth and which should be disregarded. See *PP v Somwang Phatthanasaeng*,[7] a Singapore case, but I agree with the view as expressed. I would add that in analysing the evidence of such a witness, his/her evidence should be carefully tested against other relevant evidence, bearing in mind that her credit had been impeached. In the instant case, whatever view one takes of PW11's evidence given in the lower court, her evidence is incapable, in law, of being corroborative. In any event, it would be highly dangerous to rely upon it as being corroborative. Indeed the learned sessions court judge was, in my view, justified in attaching no weight to her evidence. In my view, the evidence adduced by the prosecution as a whole is such that the learned sessions court judge cannot be said to have erred in holding that no prima facie case of rape has been made out. C D E

Ground 3 of the appeal F

Ground 3 reads:

> Having found that there was no rape, the learned trial session court judge erred in law and in procedure in failing to consider adequately or at all the alternative course of action open to her under ss 158 and 167 of the Criminal Procedure Code (FMS Cap 6). G

Two points must be observed:

(1) Before me, the submission of the learned deputy public prosecutor in this regard was directed solely to the case of the second respondent.
(2) Although s 167 of the Code was mentioned in the ground of appeal, no submission was adduced in that respect. H

It was held in *Sivalingam v PP*[8] that the requirements of ss 166 and 167 of the Code must be satisfied before a High Court in the exercise of its appellate jurisdiction alters or substitutes a conviction for a different offence, and, to warrant a substitution, there must be clear evidence that a case for the substituted offence would have been made out or established in the court below. The prosecution in our present case has failed to show how the learned sessions court judge should have but failed to act under the said s 167. I

A As regards s 158(i) of the Code, it empowers and authorizes the court to alter any charge; such alteration, however, must not prejudice the accused or occasion a failure of justice.

In *PP v Heng You Nang*,[9] the president of the sessions court acquitted and discharged the accused at the close of the case for the prosecution, B holding that there was insufficient evidence to warrant a conviction. The prosecution appealed against the order of acquittal on the ground, inter alia, that the learned president was wrong in not exercising his discretion under s 158 of the Code to alter the charge as to the date and time of the commission of the offence and had thereby caused a miscarriage of justice. In rejecting this ground, Spencer Wilkinson J said (at p 287):

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> I doubt whether s 158 imposes any duty upon a court to alter or amend the charge. I think, rather, that it is for the prosecution to apply to the court to exercise its power under that section. Under s 173(h), subordinate courts have a duty to consider the charge and amend it if necessary. Nevertheless I do not think that this section makes it incumbent on the court to search the law for D offences which an accused person *may* have committed. It is for the prosecution to decide what their real complaint against the accused is and to frame their charges or to submit amendments accordingly. No doubt, in a clear case, a president or a magistrate ought to alter a charge to fit the proved facts; but if the prosecution is unable to reach a conclusion as to the proper charge, which appears to have been the position in this case, it is in my view, quite improper to E criticize the president for failing to carry out the functions of the prosecuting officer. (Emphasis provided.)

While there is a duty on a magistrate or sessions court judge to consider whether evidence in a case shows that an accused had committed some offence other than that with which he is charged, particularly where the evidence obviously discloses that that is the situation, the main obligation F is on the prosecution to draw to the attention of the presiding magistrate or sessions court judge the possibility of convicting on a different offence. *R v Cheah Teow Peng*.[10]

In the instant case before me, it was argued that as regards the second respondent the learned sessions court judge should have considered the G application of s 158 of the Code and amended the charge to one of attempting to commit rape or abetment of rape, citing *PP v Oh Keng Seng*[11] and *PP v James Tan*[12] in support.

Each case must be considered on its own particular facts. In the case before me, the four respondents were charged with rape.

H In the submission by the prosecution at the close of the prosecution case in the session courts, the said s 158 was relied on against the fourth respondent but not against the second respondent. Neither in the lower court nor before me had the prosecution referred to any specific part of the evidence to indicate that the learned sessions court judge should have considered ss 511 or 354 of the Penal Code (FMS Cap 45). This is not I surprising. A perusal of the evidence of PW7, the complainant, will show that, apart from identifying the second respondent as being present, the testimony falls far short of indicating, with any degree of clarity, what the second respondent had done to her, if anything.

I am not persuaded that the learned sessions court judge had been wrong in omitting to consider the exercise of the court's power under the said s 158. Nor am I persuaded that it is justified to alter the charge by invoking ss 511 or 354 of the Penal Code against the second respondent.

For reasons given in the earlier part of this judgment, I am also not persuaded that the learned sessions court judge had erred in holding that there was no case for the first respondent to answer.

The appeal against the first and the second respondents is dismissed.

Appeal dismissed.

Reported by Jeanne Tan